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## RECENT PENNSYLVANIA CASES IN RE MIGRATORY DIVORCES

by

Joseph P. McKeehan

In *Meng vs. Meng*, 47 D. & C. 429, at page 442, Judge Gordon said:

"We do not know, nor do we think it important that we should know the nature or extent of the evidence presented to the Nevada Court on which it predicated its finding that defendant is domiciled there. But we can be sure either that it was not the same as has been presented to us, *or that the therapeutic properties of the climate of our sister Commonwealth are marvelously stimulative of credulity.*"

In *Com. vs. Meth*, 156 S.C. 632, 41 A. 2d 752, at 755, Judge Reno said:

"Unless the courts are to be reduced to a state of juvenile naivete, they cannot be required to accept selfserving declarations which are wholly at variance with actualities evidenced by the conduct of the party out of whose mouth they came."

The recent decisions of Pennsylvania courts involving migratory divorces are of several types. A number of them involve the jurisdiction of a court of equity to enjoin further prosecution of a divorce proceeding begun in another state. Some involve the right of a Pennsylvania court to enter a declaratory judgment as to the validity of a divorce granted in another state. A number involve the effect of such a divorce upon an outstanding support order made by a Pennsylvania court and an interesting case involves the effect of such a divorce, when the legitimacy of children depends upon its validity.

It is intended merely to collect the cases of each of these types and to call attention to the present attitude of our Pennsylvania courts in each type of case.

In the *Meng* case an injunction was granted to restrain Dr. Meng from prosecuting a divorce action in Nevada. He had previously tried to get a divorce in Philadelphia and had failed. Mrs. Meng's bill in equity alleged that the doctor was seeking to evade the laws of Pennsylvania, under which he would have had no grounds for divorce, that her husband did not truly have a domicile in Reno, and that she would suffer irreparable damage if he were permitted to continue his suit in Nevada.

The court authorized service of the injunction at what the wife claimed was still his domicile in Philadelphia and authorized the wife to make further service upon him and his attorney in Nevada. Service was made upon his attorney, but not upon the doctor personally. The injunction was, however, handed to the doctor's stepmother, from whom he rented an apartment and his office and with whom he lived.

The stepmother threw the papers, either at the writ server or his wife, who was present, and it appears that they were tossed back and forth a number of times.

The doctor proceeded with his divorce action in Reno and procured a final decree on grounds which would not have been sufficient in Pennsylvania. On the same day he appeared *de bene esse* in Philadelphia, with a petition attacking the jurisdiction of the Philadelphia court over his person and so the validity of the injunction.

This, of course, depended upon whether his actual domicile was where the injunction had been served or whether it was in Reno, as alleged by him. Judge Gordon decided first, that the effectiveness of the service of the injunction did not depend upon the willingness of the person served to accept it and that the service was valid, if made at the place which was in fact the doctor's legal domicile.

The court briefly discussed the right of a court of equity to restrain the prosecution of an oppressive action in the courts of another state, and states that this is a universally accepted power in American courts, conceding, however, that the decree operates only upon the litigant and not upon the foreign court.

In *Young vs. Young*, 16 D. & C. 287, Judge Gordon states that in 1932 there was no reported case in Pennsylvania in which an injunction had been issued to restrain the prosecution of an action for divorce in a foreign jurisdiction. He, however, found ample authority for doing so in the decisions of other states and he did not hesitate to order a preliminary injunction. The form and contents of his order appear in the report of the case.

There must be a purpose to evade the laws of one's own state and to take advantage of the laws of a foreign state, which are oppressively different from those of the home state, and the foreign suit must be one which will subject the innocent party to irreparable damage.

A valid foreign divorce deprives a wife of her right of support, ends her dower rights, changes her social status, subjects her to the notoriety and humiliation of divorcement. These and other elements meet the requirements of irreparable damage. In addition she may well be in no position to incur the expense of going herself and taking her witnesses to any and every distant state, in which her husband chances to set up a fictitious domicile, nor is she under any obligation to do so. The judge states that the courts of Pennsylvania have a solicitous concern for the protection of the status of the citizens of Pennsylvania and their rights, as other courts may well have for the like rights of their residents.

The court held that the burden of proof rested upon the doctor to establish the fact that, when service was made at what had been his home, he had in fact previously changed his domicile from that place to Nevada, for the reason that a domicile, once established at one place, is presumed to continue there until it is shown that a new one has been acquired.

To meet the burden of proof as to his alleged change of domicile the doctor offered the Nevada divorce decree, secured in disregard of the injunction. The Nevada court had found as a fact that he had been a bona fide resident of Nevada for the period required by the Nevada statutes. Friends who accompanied him to Nevada gave their opinion that he had gone there to improve his health, but the nature of his malady was not disclosed, nor why the climate of Reno might be expected to effect a cure, nor whether a long or short stay would serve his purpose. The reasonable inference accordingly remained that he would come home when his purpose in going to Nevada had been accomplished. Of course, such a temporary change of residence does not involve a change of domicile.

The doctor's real intent was indicated by the fact that he had not disturbed anything in his office or in his apartment nor did he take down his professional sign, while he was prosecuting his divorce action in Nevada. If he had intended to move to Nevada, why had he not shipped his belongings to Nevada, disposed of his professional practice in Pennsylvania and opened an office in Reno, transferred his bank account to Reno, and why did he stay in a hotel during the entire period his divorce suit was pending? There was no evidence that the doctor had done any of these things, nor did he testify in Philadelphia as to his real intent in going to Reno.

Judge Gordon observed:

"It was no mere coincidence that, having abandoned his efforts to secure a divorce from his wife in the jurisdiction of their common and lifelong domicile, he selected the congenial and salubrious atmosphere of a place notorious among divorce seekers for the cure of his alleged ill-health."

The finding of bona fide domicile by the Nevada court was held not to be binding upon the Philadelphia court for several reasons. First, it was procured in contempt of the injunction previously served, though the effectiveness of the service was the very issue before the court, and this in turn depended entirely upon the decision as to real domicile at the time of the injunction was served on the doctor's stepmother. Second, actual domicile was the foundation of the Nevada court's jurisdiction to entertain the suit at all and therefore it was open to inquiry.<sup>1</sup>

As to the effect of the injunction he states:

"Our injunction imposed upon defendant a personal incapacity to prosecute the action in Reno until the final determination of this case. An incapacity which is special and individual adheres to the person subject to it wherever he goes, and it may well be that, although our injunction does not operate directly upon the Nevada court, that court was bound, under the full faith and credit clause of the Federal Constitution, to recog-

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<sup>1</sup>Williams vs. North Carolina, 325 U.S. 226, 89 L. ed. 1577, 65 S.C.R. 1092; Esenwein vs. Penna., 325 U.S. 279, 89 L. ed. 1608, 65 S.C.R. 1118, 348 Pa. 455, 35 A. 2d 335, 153 S.C. 69, 33 A. 2d 675 and see 106 A.L.R. 6 and 157 A.L.R. 1399.

For a list of the many notes and articles which have been written on the two Williams cases, see 44 Mich. L. Rev. 1066, and see 48 Dick. L. Rev. 112.

nize and give effect to it as regards the enjoined defendant, and hence that a divorce procured in such circumstances would have no validity outside of Nevada, and might even be a nullity, revocable in that state itself."

In *Mianulli vs. Mianulli*, 51 D. & C. 497, another injunction case, it is said:

"Plaintiff has attempted to prove that the Florida residence of defendant is fraudulent because it was acquired only for the purpose of securing a divorce. We do not so regard it but believe that the relief prayed for should be granted nevertheless. This proceeding does not present the more typical aspects of a hasty trip to a foreign jurisdiction for a stay sufficient in duration only to meet the minimum procedural requirements of the applicable divorce statute. Defendant has been out of this jurisdiction for three years and his physical severance, despite the continuation of utility services in his name, is complete. However, while he may have acquired a sufficient residence in the State of Florida for all general purposes, including the exercise of his right of suffrage, taxation, and the like, for purposes of the matrimonial status and the severance of that bond he is still domiciled in Pennsylvania, whose interest in his marital status here may and does limit such a new acquisition."

In the above case, as in the *Meng* case, the defendant was not served personally with the injunction, but the bill and decree of preliminary injunction were handed to an adult daughter at his matrimonial domicile and supplemental service was made on the defendant in Florida. Again the court held that the defendant was not domiciled in Florida, and that his purpose in bringing suit in Florida was to evade the laws of Pennsylvania. The opinion in the case was written after hearing on the preliminary injunction. It accordingly contains the necessary findings of fact and conclusions of law and an appropriate form of decree nisi. No exceptions were filed and the decree became final.

In another case in Philadelphia, decided about the same time as the preceding case, an appeal was taken to the Supreme Court and the order of Judge Gordon was affirmed on his opinion. (*Janney v. Janney*, 350 Pa. 133, 38A. 2d 235.)

This is another case of a husband who went to Nevada to get a divorce. The bill and preliminary injunction were served at his residence in Philadelphia, but the husband continued his action in Nevada and secured a decree of divorce in that state. As in the *Meng* case, the sufficiency of the service was attacked preliminarily and the service was sustained on the ground that his actual residence was where service had been made. The court accordingly had jurisdiction over his person.

It appears that the defendant's business was and always had been in Philadelphia and that he returned to Philadelphia on the very day he procured his decree of divorce. While he was doing so, he continued to maintain an apartment in Philadelphia.

With reference to this Judge Gordon states:

"Immediately after this testimony was given on the morning of July 7th the final decree was handed down, and before the same day's sun had set,

the man who had thus solemnly sworn to an intention to make Reno his permanent home, shook its dust from his feet and boarded a train for Philadelphia, where he returned to his apartment, 2601 Parkway, and resumed his business here. In such circumstances it is impossible to believe that his visit to Nevada was for any other purpose than to secure a divorce from his wife, or that he ever intended to remove his residence to Nevada."

*Grande vs. Grande*, 55 D. & C. 647, is the most recent case involving a declaratory judgment as to the validity of a foreign divorce and of a subsequent remarriage of the libelant in Pennsylvania. The opinion by Judge Laub of Erie County, contains a full history of the federal cases beginning with the celebrated case of *Haddock vs. Haddock*.

After an attempt to get a divorce in Erie County, Mrs. Grande went to Reno and six weeks after her arrival brought suit for a divorce. Though her husband was not served with process in Nevada nor was any appearance entered for him, a divorce was granted, and Mrs. Grande promptly married one Keasey. On the ground that Mrs. Grande was never a bona fide resident of Nevada her divorce was adjudged null and void and she was adjudged to be still the wife of Mr. Grande "to the fullest extent."

The court said in part:

"There can be no doubt but that every citizen is entitled to a clear understanding of his own marital status. Almost every decision of his daily life, whether economic, social or spiritual, depends upon the certainty of that status. The right to convey real estate without joinder of a spouse; the rights, duties, and liabilities and obligations arising under the Federal income tax laws; the important function of preparing a will; the right to marry and beget legitimate children; the uncertainty as to the obligations to support and maintain an alleged spouse—all of these and many other similar problems cannot be resolved by an individual unless his legal status as a married or single person be clear and incontestable. Therefore, a petition for a declaratory judgment is the proper method by which that status can be adjudicated: *Melnick vs. Melnick*, 154 Pa. Superior Ct. 481."

The court, however, points out that a person in the position of Mrs. Grande could regard herself as divorced unless and until the decree was attacked and it was affirmatively proven that she was not a bona fide resident of the divorcing state and that the burden of proof is on the one who seeks to upset such a divorce. This is in contrast to the rule applied in injunction proceedings that the matrimonial domicile is presumed to continue until proof of a change. It is therefore greatly to the advantage of the innocent spouse to seek an injunction, rather than wait until a divorce has been granted and then attempt to have it invalidated by a declaratory judgment.

The *Esenwein* case was one involving the effect of a foreign divorce upon a support order entered before such divorce. It was held proper to refuse to revoke such an order when it appeared that the foreign court lacked jurisdiction for want of bona fide domicile of the libellant. The divorce decree prima facie entitled Esenwein to a revocation of the support order. However, as he had procured his divorce as soon as he could after his arrival in Nevada and left the same day on which he received his decree of divorce, it was held that his actions spoke louder than his words. There was no evidence that conditions had so changed immediately after the decree as to make it desirable that he alter the intention, to which he had testified a few hours before, to make Nevada his "permanent place of residence." Justices Drew and Maxey dissented on the ground that the burden of proof that there was no bona fide domicile in Nevada had not been met and that Esenwein's actions merely raised a suspicion that he never intended to remain in Nevada.

In Pennsylvania a support order does not survive a valid divorce and so we have several recent cases in which the efficacy of a foreign divorce to end the duty to support one's wife has been the question to be decided. Three of the justices of the U.S. Supreme Court expressed the opinion that Pennsylvania might continue to require support, regardless of the validity of the foreign divorce, in the absence of an appearance or personal service on the respondent, Justice Douglas saying:

"The state where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized. In that view Pennsylvania in this case might refuse to alter its former order of support or might enlarge it, even though Nevada in which the other spouse was domiciled and obtained his divorce made a different provision for support or none at all."

Two Superior Court cases of this type have been decided since the *Esenwein* case. They are *Com. vs. Saunders*, 155 Pa. Super. 393, 38A. 2d 730 and *Com. vs. Meth*, 156 Pa. Super. 632, 41A. 2d 752. In the former, the husband had obtained a divorce in West Virginia and sought to have a support order vacated on that ground. The lower court was reversed for vacating the order and refusing to permit the wife to attack the jurisdiction of the West Virginia court by showing want of a bona fide domicile therein of her husband. The court conceded that, had the divorce been obtained in the "matrimonial domicile," it would have ended the duty to support.

In the *Meth* case the lower court made a support order notwithstanding a prior divorce obtained by the husband in Nevada and the Superior Court affirmed the order. Meth had tried to get a divorce in Philadelphia and failed. Shortly thereafter he left for Reno and obtained a divorce. The very next day he left Reno

and only returned for a few days several months later. "That actions speak louder than words is sound law, as well as proverbial wisdom," said the court. The inference from Meth's conduct that he never actually did intend to make Nevada his home was held justified, though he testified that he left because his bride was "lonely and homesick."

The legitimacy of children of a second marriage after such a divorce was the question in *Thorn's Estate*, 53 D. & C. 659 to 698, 353 Pa. 603, 46 A. 2d 258. Under the Thorn will George Bullock received a portion of the income of a trust fund until his death and, if his children were legitimate, they were entitled to share in this income after his death.

Bullock had absconded from Philadelphia in 1903 with his secretary after stealing \$2,600. from Fidelity Trust Company. He left behind him his wife and child and lived in adultery with his secretary and her sister until after his wife's suicide in 1938. By them he had twelve children.

In 1929 Bullock obtained a divorce in Indiana and promptly married the sister of his secretary, perhaps because she had borne him nine children, while his secretary had borne him only three. The surviving seven of the group of nine claim they were legitimated by reason of that marriage and their claim was sustained. Their status was questioned by an attack on the effectiveness of the Indiana divorce. The claimants had the benefit of the presumption of legitimacy and the rule that such presumption can be overcome only by "*clear, direct, satisfactory and irrefragable proof to the contrary.*"

Jurisdiction of the Indiana court was not attacked on the ground that Bullock did not have his domicile there but on the ground that he had committed a fraud on that court. Mrs. Bullock had no knowledge of the proceedings until after the decree. Bullock had sworn that her residence was unknown and service had been made by publication only. Testimony would have supported a finding that Bullock swore falsely but the auditing judge had not so found. He further held that "matters of service of process cannot be inquired into by a foreign State where the State decreeing the divorce has acquired jurisdiction by a bona fide residence of one spouse."

It was held to be immaterial that the legitimation of the claimants occurred after the death of the testator under whose will the trust was created, since they had been legitimated at the time their interests accrued.

The dissenting opinion by Judge Bolger, 53 D. & C. 689-697 is both interesting and instructive. However, the decision of the majority of the court in banc was affirmed by the Supreme Court.

It is apparent that once a divorce has been decreed in any state, the courts of all the states must accord prima facie validity to that decree but, if the burden of proof of the absence of bona fide domicile is recognized, the courts of the other



states may find that such burden has been sustained and refuse to recognize such decree in any proceeding involving marital status which may later be begun in such other courts.

The serious question, as to whether a deserted spouse can elect to acquiesce in the decree of the foreign court and remarry on the strength of it, remains to be answered in Pennsylvania. Is such decree merely voidable at her election or is it void and is she guilty of bigamy, if she remarries on the faith of it? Are the children of the second marriage legitimate? Surely the deserted wife, who so remarries, would be estopped to claim a share in her first husband's estate. Can the relatives of her second husband successfully resist her claim to share in his estate? Can the second husband resist a support order on the ground that his marriage was to one already married and not validly divorced?